United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

ORIGINAL

77-7138

To be argued by
MARVIN F. HARTUNG

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P/S

United States Court of Appeals
FOR THE SECOND CIRCUIT

FRUEHAUF CORPORATION,

Plaintiff-Appellant,

against

SEATRAIN LINES, INC., and
STRICK CORPORATION,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF OF FRUEHAUF CORPORATION, PLAINTIFF-APPELLANT

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TABLE OF CASES AND STATUTES CITED

No cases or statutes are cited in this brief.

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BRIEF OF FRUEHAUF CORPORATION, PLAINTIFF-APPELLANT

Statement

This is an appeal by Fruehauf Corporation, plaintiff-appellant, from a judgment entered on February 28, 1977 in favor of the defendants-appellees Seatrain Lines, Inc. and Strick Corporation against Fruehauf Corporation dismissing the complaint. Judgment was entered upon the decision and opinion of Honorable Edward J. Lumbard, United States Circuit Judge, sitting by designation without a jury.

Facts

Plaintiff-appellant Fruehauf Corporation ("Fruehauf") sued in this diversity action to recover $400,000 in damages from defendants-appellees Seatrain Lines, Inc. ("Seatrain") and Strick Corporation ("Strick") by reason of the failure of Seatrain to return certain equipment leased from Fruehauf at the expiration of the lease. Fruehauf contends that Seatrain and Strick (sometimes referred to collectively as "the defendants") converted such leased equipment to their own use, Strick having induced Seatrain to recognize Strick's claim thereto (in lieu of Fruehauf's) and thereupon having sold such equipment to Seatrain.

Fruehauf, a Michigan corporation, is engaged in the manufacture, sale and leasing of trailers, containers and accessories for use in the transportation industry. Strick, a Pennsylvania corporation, is similarly engaged. Seatrain, a Delaware corporation, is engaged in the purchase, leasing and use of containers, trailers and accessories for the transportation of cargo by land and sea.

On January 1, 1956 Strick's predecessor, a privately owned company, was acquired by Fruehauf and became an unincorporated division of Fruehauf known as the Strick Division.

On February 6, 1964 Fruehauf, through its Strick Division, entered into a lease with Seatrain covering 100 refrigerated containers, 100 wheeled container running gears ("bogies") and 25 diesel generators (later increased to a total of 40). The lease was for a period of 96 months, ending November 30, 1972, and it specified that at its expiration the equipment was to be returned to Lessor (defined in the lease as "Strick Division, Fruehauf Corporation") "in the same condition and state of repair . . . reasonable wear and tear excepted."

In late 1964, the American Institute of Certified Public Accountants determined that certain leases could be treated as sales for accounting purposes. The financial management of Fruehauf thereupon decided to convert all of their so-called "full pay-out leases" to sales in the intra-company treatment thereof, a full pay-out lease being one in which the total rentals, after deducting interest charges, is more than 90% of the cash selling price of the equipment. The Seatrain lease qualifying under these requirements, it, together with other similarly qualifying leases, was converted to a sales classification as aforesaid and thereafter, on December 15, 1964, was sold to Fruehauf Finance Corporation. The latter (hereinafter "the Finance Company") is a separate corporate entity, wholly owned by Fruehauf. Fruehauf received the discounted value of the remaining lease payments in cash and Strick Division received an intra-company credit in this amount. Because of their classification as sales transactions, the equipment underlying the Seatrain lease and other full pay-out leases was no longer given any book value for balance sheet purposes.

On May 28, 1965 the Federal Trade Commission issued an Order mandating divestiture of the Strick Division and certain assets acquired from the Hobbs Companies. Between the date of the FTC Order and the Order of the Court of Appeals for the Seventh Circuit entered January 21, 1966 (which confirmed the FTC Order after eliminating the Hobbs assets therefrom) Fruehauf conducted negotiations with executives of its Strick Division, culminating in the sale of the Strick assets to a newly created corporation (Strick), pursuant to an agreement dated January 11, 1966 ("the 1966 Agreement").

Seatrain continued to make lease payments to Fruehauf throughout the life of the lease, which payments Fruehauf forwarded to the Finance Company. At the expiration of the lease in 1972 both Fruehauf and Strick claimed owner-

ship of the equipment and each offered Seatrain indemnification with respect to the disposition thereof. Seatrain elected to recognize Strick as the owner of the equipment.

Specification of Errors

1. The Court erred in failing to recognize that the conversion of the Seatrain lease into a contract of sale for accounting purposes and the contemporaneous purchase thereof by the Finance Company divested Strick Division of any rights in the residuals.

2. The Court erred in holding that the purchase of the lease by the Finance Company carried with it no possessory or property rights in and to the leased equipment.

3. The Court erred in holding that the FTC Order mandated divestiture of the Seatrain lease residuals.

4. The Court erred in holding that the 1966 Agreement transferred, or was intended to transfer, any Seatrain lease residuals.

5. The Court erred in holding that the conduct of the parties during the life of the lease was consistent with ownership of the equipment by Strick.

POINT I

Conversion of the Seatrain lease into a sale for accounting purposes and purchase of the lease by the Finance Company divested Strick Division of any rights in the residuals.

The conversion of the Seatrain lease into a sale for accounting purposes, the contemporaneous assignment thereof to the Finance Company and the compensation of

Strick Division therefor completely disposes of Strick's claim as to ownership of the residuals. True, such conversion and purchase would have no effect on Seatrain's legal position with respect to the equipment in question (which continued to be that of lessee under a lease); but it would be fully effective to change the legal position of the Strick Division and its successor, the defendant Strick Corporation. The effect of this transaction as to Strick Division (and, subsequently, defendant Strick) was to dispose of their interests in the residual and, accordingly, the Seatrain residuals were no longer an asset to which the divestiture sale could attach.

It may be well to note here that the purpose of converting the Seatrain lease and other full pay-out leases to sales as aforesaid was to increase the ability of the Finance Company to advance funds to Fruehauf in view of certain investment restrictions in agreements between the Finance Company and its institutional lenders. See plaintiff's Exhibit 10, Exhibit Volume, pages 359-360; Witness Silverstein, Transcript, page 60.

The defendants contend, and apparently the Court below agreed, that because the compensation received by Strick Division contained no amount specifically earmarked as payment for the residuals, no consideration for such an interest was in fact paid. It is submitted that this does not follow. A sale can be for any price and can be arrived at in any way the buyer and seller agree upon. It is clear that in reflecting this transaction on its books Strick Division removed these assets from the leased equipment account and recorded a sale thereof. (Witness Silverstein, Transcript, page 85).

The compensation given covered all of Strick Division's interest, which was that of a seller after conversion of the lease to a sale. So long as a seller remains unpaid, so long as there is any balance owed by the buyer, the seller has certain conditional property and possessory rights in the

equipment in event of default. But, when all contract instalments have been paid in full, the seller has no further property or possessory rights of any nature whatsoever. There are no residuals.

When it purchased the Seatrain lease and Strick Division was paid off, the Finance Company took on the risk of possible default by Seatrain and acquired all of Strick Division's rights under the lease with respect to the leased equipment. The witness Silverstein, Fruehauf's controller, testified "it is my understanding that the Finance Company purchased that lease as a contract and everything that went with it". Transcript, page 63, lines 18-20. This obviously included the right to resort to the Seatrain equipment in the event of loss, damage or default.

The fact that there is no bill of sale or other document of title (in the usual technical form of such instruments) between Fruehauf and the Finance Company is of no significance. This was a transaction between a parent and a wholly owned subsidiary—the operating relationship between these entities was not, and did not need to be on the same level of formality that one would expect between parties dealing at arm's length. Having sold the Seatrain lease to its subsidiary, and received full compensation therefor, it was obvious that Fruehauf would implement or perfect such transaction in any way that future contingencies might require. To put it another way, if the Finance Company did not receive a formal bill of sale, it certainly had a right to have one delivered on request. If there is any validity to the principle of giving effect to substance over form, it would be hard to imagine a more appropriate situation in which to apply such principle than in this kind of transaction between a parent and its wholly owned subsidiary. In short, if technical legal title was not transferred to the Finance Company, then Fruehauf held such technical legal title in effect as trustee for the Finance Company for the latter's use and benefit.

In paragraph 12 of the Seatrain lease (Exhibit Volume, page 285) there appears the following:

> "Lessor shall have the right to assign this lease and/or the rentals reserved hereunder. In the event of an assignment of this lease by Lessor, the assignee shall acquire thereby all rights and remedies possessed by or available to the Lessor."

Among the "rights" of the Lessor referred to above are ownership (paragraph 4, page 281) and repossession and retention (paragraph 8, pages 283 and 284) of the equipment.

At this point it is appropriate to examine more closely the documentation between Fruehauf and the Finance Company since the defendants have argued and the Court below has found that the Finance Company "did not acquire any possessory interest in the underlying equipment and that the right to the residuals remained with Strick Division of the Fruehauf Corporation." We believe that a fair and reasonable reading of the documentation requires a contrary conclusion.

The transaction between Fruehauf and the Finance Company is delineated in Plaintiff's Exhibit 9 (Exhibit Volume, pages 346 to 358, inclusive), which consists of a Purchase Agreement, an Assignment and a Schedule, the latter listing the Seatrain obligation in the amount of $1,715,501.45 (being the balance of the lease payments at December 31, 1964). The Purchase Agreement provides for the sale by Fruehauf to the Finance Company of "Customer Obligations." A Customer Obligation is defined as an "installment *contract*" for "sale of personal property" (emphasis supplied) (1st paragraph, page 346). Obviously, the Seatrain lease and other full pay-out leases converted to sales transactions according to the accounting procedure described above were deemed to be included in Customer Obligations for purposes of the Purchase Agreement.

The Assignment given by Fruehauf to the Finance Company to implement the sale of Customer Obligations provided:

> "FOR VALUE RECEIVED, the undersigned does hereby sell, assign and transfer unto Fruehauf Finance Company, its successor or assigns all of the right, title and interest of the undersigned in, to and under each and every Customer Obligation as defined in the Purchase Agreement dated December 15, 1964, between the undersigned and said Fruehauf Finance Company owned by the undersigned at the close of business on December 31, 1964, and all of the right, title and interest of the undersigned in and to the balances owing."

It is noteworthy that the foregoing Assignment not only specifically covers "each and every Customer Obligation" but also, by the final conjunctive clause, "the balances owing" thereon. One cannot assume that this is mere idle language. On the contrary, it clearly implies an awareness of the distinction between a contract and the receivable due under the contract and makes it clear that *both* are being transferred.

Consistent with the view that the Finance Company acquired the property and possessory rights of Strick Division under the Seatrain lease is the language of the Finance Company's assignment back to Fruehauf on December 4, 1972 (upon expiration of the lease) (Plaintiff's Exhibit 8, Exhibit Volume, page 345). Here the assignor conveys all its right, title and interest not only to the Seatrain lease but "in and to the equipment leased thereunder" (specifying the same in detail).

Passing from the documentation itself, let us restate the compelling reasons for the conclusion we have been urging. By necessity, by the very logistics of the situation, as well as by universal custom and practice, property and possessory rights in leased equipment must be

held by, or at a minimum, immediately available on demand to, the entity furnishing the financing. Such rights represent the only means by which the financing entity can secure itself against loss, damage or default. As pointed out above, this does not mean that the Finance Company had to hold technical legal title. It would be entirely sufficient for such title to be held by the parent of the Finance Company for the latter's use and benefit. *But what would be unthinkable is that the parties ever intended such title to be held by Strick—painstakingly set up pursuant to court order as an entirely independent entity—while the Finance Company remained unpaid.*

Let us postulate this simple question: What would have happened if Seatrain had defaulted on the lease? Would *Strick* have repossessed the equipment and left the Finance Company out of pocket for the balance of the lease payments? Merely to ask the question is to expose the fallaciousness of the concept. To suppose for one moment that parties with years of experience in financing operations deliberately contracted for such an anomalous and grossly inequitable result (or that the FTC mandated it) dumbfounds common sense. (Later in this Brief, we shall consider what happened when some of the equipment was wrecked and it will be seen that the treatment of that event by the parties fully confirms our position that it was never transferred to Strick.)

We believe it is axiomatic that one does not separate the security (the equipment) from the risk and that there was no such intent here. The question as to whether the parties intended title to pass to Strick under the 1966 Agreement when the lease payments to the Finance Company had six more years to run must be answered in the negative.

POINT II

The FTC order did not mandate the divestiture of any Seatrain lease residuals.

The Order of the Federal Trade Commission in the form modified and affirmed by the United States Court of Appeals for the Seventh Circuit on January 21, 1966 provided in part as follows:

> "IT IS ORDERED that
>
> (A) Respondent, the Fruehauf Corporation, a corporation, and its officers, directors, agents, representatives, and employees shall, within one (1) year from the date of this order, divest itself absolutely, in good faith, of all assets of its Strick Trailers Division and such other assets as may be necessary to restore The Strick Company and Strick Plastics Corporation as a going concern and effective competitor in all the lines of commerce in which it [sic] was engaged immediately prior to its acquisition by respondent.
>
> As used in this order, 'assets' shall include any properties, rights and privileges, tangible and intangible, including but not limited to all plants, machinery, equipment, contract rights, patents, licenses, trade names, trademarks and good will of whatever description.
>
> (B) Pending divestiture, respondent shall not make any changes in any of the above-mentioned assets which impair their present capacity for the production, distribution, sale or financing of truck-trailers, or impair their market value, unless such capacity or value is restored prior to divestiture."

There are a number of things to be said about the foregoing. In the first place, it has no retroactive thrust. It is effective and operative going forward from the date of the Order. Paragraph (B) is particularly illuminating in

this connection. It restricts changes in the assets which "impair" (unless restoration is made) "pending divestiture." There is nothing here that would require undoing of the transactions discussed under the preceding Point I of this Brief, which were consummated more than a year (December, 1964) before entry of the Order. Since those transactions involved the sale of Strick Division's interest in the Seatrain equipment, and its compensation therefor, such equipment was not an asset of Strick Division on the date of the Order any more than a trailer sold to a third party for cash prior to the date of the Order would be an asset of Strick on that date. The clear intent of the Order was to deal with the assets that existed on the date of entry, January 21, 1966.

But, the most significant error of the defendants and the Court below has been their refusal to read the Order as a whole, in the context of its overall purpose and intent. Such purpose and intent are most clearly illuminated in the provision which requires not only a divestiture of existing assets of the Strick Division, but also *"such other assets as may be necessary to restore The Strick Company and Strick Plastics Corporation as a going concern and effective competitor in all the lines of commerce in which it was engaged immediately prior to its acquisition by respondent."* (Emphasis supplied)

Here we have the key to what the divestiture was all about—a broad gauge directive to restore Strick to its former status as a competitor. One does not comply with such an order by counting nuts and bolts. Rather, one complies by looking to the substantial result, a result in this case concerning which neither Strick, the FTC nor the Court has voiced any complaint whatsoever. It is important to note that the Order contains no detailed blueprint for its implementation. It is designed for substantial compliance. If there could be any doubt of this, one has but to consider, for example, the problems of selection and quantification that would be involved in implementing the above quoted "such other assets" directive. Is it not clear

that "such other assets" could consist of virtually anything, and as much or as little, as the parties making the judgment could agree upon?

In short, even if Seatrain lease residuals were owned by Strick Division on the date of the Order, which we deny, it would be straining beyond reality to argue that failure of Fruehauf to transfer such residuals to Strick would constitute a breach of the Order. So far as appears from the record this is the only instance of its kind about which there has been any disagreement between the parties. We are looking at equipment leased to a third party for the estimated life of such equipment, the lease period terminating approximately six years after the date of divestiture. No one at the divestiture date could possibly know whether six years later there would even be a residual, much less the value of it. How can it be reasonably asserted that such an "asset" would be essential to the restoration of Strick to a competitive status?

In marked contrast with the foregoing, the defendants and the Court below have refused to look at the Order of the Court of Appeals from its "four corners." Instead, they have focused myopically on a few words taken out of context, i.e., "all assets" of the Strick Division and "any properties, rights and privileges tangible and intangible," and by over-reliance on literalism and semantics have emerged with a conclusion as to the Order's requirements that we believe is seriously distorted.

In summary, we do not think the answer to the basic question in this case—i.e., who was entitled to the Seatrain lease equipment?—is to be found in the FTC Order. Stated another way, we do not think it can be said that the FTC Order required the framers of the 1966 Agreement to provide for the transfer of the Seatrain residuals to Strick even if they could be said to be "assets" of the Strick Division at that time—a proposition which, as stated before, we deny. It remains to be seen whether the 1966 Agreement actually contains such a provision. This will be the subject discussed under the next succeeding Point III.

POINT III

The 1966 Agreement did not transfer, and was not intended to transfer, any Seatrain lease residuals.

Under the 1966 Agreement the base price (subject to adjustment) for the assets sold was $22,000,000, representing the book value thereof, and $17,000,000 "for the leases, patents, patent applications, inventions, licenses, rights under licenses, trade marks and trade names (including the 'Strick' name) and goodwill . . . making an aggregate presently estimated at $39,000,000." The Agreement did not separately list each asset to be sold; instead, the assets were listed by broad categories. The defendants contended below that there were three categories which effected the transfer of the Seatrain lease residuals: (1) "Property, Plant and Equipment," (2) "Used Trailers" and (3) "Prepaid Expenses and other Assets." In order to examine these terms in their proper context it is appropriate to quote in full the provisions where they appear.

The 1966 Agreement provided, in part, as follows:

> "2. The assets to be sold, assigned and transferred by Seller to Buyer at the Closing Date (as defined in Section 6(a) hereof) shall consist of the following as then constituted:
>
> (a) The assets specified by classes below in this Section 2(a), and tangible items identified by reference to the Property List defined below. Attached hereto is a comparative balance sheet captioned 'Strick Division (Including Lamicor Division) Comparative Balance Sheet' as at December 31, 1964, September 30, 1965 and October 31, 1965 (the 'Comparative Balance Sheet'), which shows the classifications of assets and liabilities attributed to the Strick Division and the amounts applicable to each classification as of the respective dates indicated. The same

classifications (without the dollar amounts) are used in the list appearing below in this Section 2(a), and the assets to be transferred at the Closing Date shall include those in the following classifications:

Current Assets:
- Trade Accounts and Notes:
  - Equipment Invoiced
  - Equipment Uninvoiced
  - Advances on Trades
  - Parts and Service
  - Lease Income
- Other Receivables
- Inventories
  - New Trailers
  - Used Trailers
  - Plant Inventories

Property, Plant and Equipment (net of Accumulated Depreciation)

Prepaid Expenses and Other Assets (except finance charges prepaid to Fruehauf Finance Company)

The parties have identified by reference to this Section 2(a) a list and brief description of the real properties owned by or leased to Seller and used by the Strick Division (the 'Property List'); and the classification 'Property, Plant and Equipment' in the Comparative Balance Sheet, and also in the Approved Balance Sheet defined in Section 5(c), shall include all the plants, structures, fixtures, tools, dies, jigs, machinery, furniture, equipment and other physical property owned by Seller and used by the Strick Division, located in the plants and structures or on the properties referred to on the Property List, and all moveable equipment wherever located used in the operations of the Strick Division, whether or not expensed or charged off or for other

reasons not given a carrying value on the Comparative Balance Sheet or the Approved Balance Sheet."

The 1966 Agreement further provided that:

"5.(a) Each of the parties shall make available to the other forthwith all of the books and records applicable to the Strick Division, and shall cause a balance sheet of the Strick Division to be prepared as of the close of business on December 31, 1965 (the 'Effective Date'), under the joint supervision of Seller's Comptroller or such other person as may be designated by Seller, and a Vice President of the Strick Division or such other person as may be designated by Buyer. Such balance sheet shall be prepared in accordance with generally accepted accounting principles (except as otherwise required by the provisions of this Agreement) and, where applicable, on the basis of the knowledge of the responsible officers of Seller and of the Strick Division, in good faith; and each party agrees for itself and its own responsible officers that it and they will use their best efforts to assure that the balance sheet as of the Effective Date shall not be inaccurate and shall fairly reflect, on its face or in notes appended thereto, the assets to be purchased and the liabilities to be assumed by Buyer hereunder, as constituted at the Effective Date, in accordance with generally accepted principles of accounting . . ."

The Approved Balance Sheet referred to above, audited by Fruehauf's independent certified public accountants, sets forth the following classification of the assets of the Strick Division:

"CURRENT ASSETS

Cash
Accounts Receivable:
Trade
Other

Inventories—at lower of cost
(first-in, first-out method)
or market:
New Trailers
Material, service parts and work in process
Used Trailers
Prepaid expenses

OTHER ASSETS:

Equipment leased to others
Less, Accumulated Depreciation

PROPERTY, PLANT AND EQUIPMENT (at cost):

Land
Buildings
Machinery and other equipment
Construction in progress
Less, Accumulated Depreciation
Leasehold improvements, net of accumulated amortization"

(Exhibit Volume, page 364).

The Court based his holding on the category "Property, Plant and Equipment" in Section 2(a). He held that in view of this disposition, it was unnecessary to pass upon the categories "Used Trailers" and "Prepaid Expenses and other Assets."

The caption "Property, Plant and Equipment" on a corporate balance sheet has a well established meaning and usage. It means simply the complex consisting of real estate, building, fixtures, machinery, accessories and miscellaneous apparatus which when taken as an integrated whole constitute the place where and the means by which manufacturing or service operations are conducted. The three terms when used together are not to be taken in the disjunctive—indeed they have a different meaning when

used together than they do when used separately. They connote a total *productive* facility, as distinguished from the *product* of that facility. Stated another way, "the term 'property plant and equipment' comprises tangible assets held for the services they yield in the production of other goods and services", Robert S. Kay, partner, Touche Ross & Company, Chicago, "Accounting for property plant and equipment", Chapter 55, Financial Executive's Handbook, page 1003.

It should be noted that Section 2(a), in the latter portion thereof, contains an internal definition of "Property, Plant and Equipment" that is virtually on all fours with that stated above. It is not until we get to the final two clauses of Section 2(a) that we come to the language that swayed the decision below. It is the following:

> "and all moveable equipment wherever located used in the operations of the Strick Division, whether or not expensed or charged off or for other reasons not given a carrying value . . ."

One would think that the qualifying words "used in the operations of the Strick Division" would be sufficiently clear to limit the term "moveable equipment" to that used in the productive process. But here the Court below put forth an explanation which after encountering some threshold "incongruity" seems to have been decisive. It is contained in Footnote 5 to the decision and is as follows:

> "5/ At first glance there may seem to be some incongruity in referring to the residuals as 'equipment . . . used in the operation of Strick Division.' However, it must be remembered that one of the 'operations' in which Strick Division was engaged was the leasing of its products. Further, the sentence structure of this part of the agreement itself supports the construction that the 'movable equipment' clause was intended to serve a broad catchall purpose for assets that had no

> carrying value and might otherwise be overlooked. The need for such a clause is particularly evident in the case of equipment such as is at issue here, which had been written off the books and was in the hands of a third party under a long-term lease. It is also unlikely that the parties would have entirely overlooked this situation as the residual value of the equipment was not insubstantial and Bachman testified that he had personally negotiated the Seatrain lease."

It is submitted that the Court's "first glance" gave the true, common sense picture. In resisting it the Court fell into error. The ultimate rationale rests on two bases: The first is that the "operations" of the Strick Division included "the leasing of its products." Of course. But, the *activity* of leasing, the function, is something quite different from the *product* leased. And, *present* operations are the operations intended, not *past* transactions. The leasing to Seatrain had taken place almost two years before. It was history. Strick Division was not even collecting the lease payments. We have already observed that the FTC Order had no retroactive thrust and the same is true of the 1966 Agreement.

The second basis of the Court's rationale is that the "moveable equipment" clause was intended to serve "a broad catchall purpose for assets that had no carrying value and might be otherwise overlooked." We have no quarrel with a clause that "catches" assets with no carrying value. But, what assets? Our difference with the Court is that he says *all* moveable equipment, whereas we say the context (particularly the phrase "used in the operations of the Strick Division") limits the equipment to that used in the *production* of goods and services—storage containers, vehicles for hauling supplies and disposing of waste, company owned automobiles used by plant personnel, etc. We submit that it would be strange draftsmanship indeed to tack a catchall intended to cover anything

and everything to the end of a paragraph on "Property, Plant and Equipment," dealing solely with the production process. Here is another example of taking words in isolation and refusing to relate them to their context. See Witness Silverstein, Transcript, page 53, lines 2-11; Witness Rushmer, Transcript, pages 107, 111-12.

The Court's final observation in Footnote 5 to the effect that "the need for such a [no carrying value] clause is particularly evident" in order to catch equipment such as the Seatrain equipment is of course nothing more than circular reasoning. Such a clause is "needed" only if you first conclude that Strick is entitled to the equipment. If you start with the opposite premise that Fruehauf is entitled to it, there is no need for such a clause. Finally, it may be noted, if perhaps only as an interesting curiosity, that if the need for such a clause is as extensive as the Court thought, obviously such a clause ought not be limited merely to "*moveable* equipment." Might there not be a substantial amount of *non-moveable* equipment without carrying value?

It is undisputed that the Seatrain lease was not discussed in the divestiture negotiations. Such testimony as the witness Bachman gave on the general subject of leased equipment was far from decisive of the issue here under consideration and the reliance thereon by the Court below appears to have been largely influenced by his view of what was required to comply with the FTC Order. Moreover, the Court was flatly in error in holding that the witness Silverstein "failed to specify which leases were sold or what, if any, distinction was drawn between those leases sold and those retained" and thereupon dismissing his testimony on this subject.

The following appears in Mr. Silverstein's re-direct examination on page 90 of the Transcript:

> "Q. Was it your understanding that any leases which had been considered to be for intramural accounting

purposes, contracts of sale, were any of these leases sold according to your understanding, to Strick Division?

A. According to my understanding, they were not sold as part of this agreement.

Q. Were any leases where the form of document was strictly a lease sold to Strick Corporation on this January 11, 1966 agreement?

A. The non-full payout leases entered into by Strick were sold to Strick."

The non-full pay out leases sold to Strick are shown on the Approved Balance Sheet (Defendants' Exhibit E, Exhibit Volume, page 364) under the caption "OTHER ASSETS: Equipment leased to others." The amount stated, net of accumulated depreciation, is $1,306,927.97.

There is no sub-caption "Equipment leased to others" either in Section 2(a) of the 1966 Agreement or in the Comparative Balance Sheet annexed thereto. In those documents the nearest corresponding category is "Prepaid Expenses and Other Assets." While the defendants have mentioned this category, along with that of "Used Trailers" appearing under the caption "Inventories," they have made no serious contentions in support thereof and the Court found it unnecessary to pass upon them. (Footnote 7). It is significant that nowhere in the documentation are *any* of these categories footnoted with a "no carrying value" clause such as we find in the case of "Property, Plant and Equipment." This in spite of the agreement by the parties in Section 5(a) that "they will use their best efforts to assure that the balance sheet as of the Effective Date . . . fairly reflects, on its face or in notes appended thereto, the assets to be purchased . . ."

POINT IV

The conduct of the parties confirms Fruehauf's ownership of the Seatrain residuals.

We have already noted that Seatrain continued to make rental payments to Fruehauf after the divestiture sale throughout the life of the lease, which payments Fruehauf forwarded to the Finance Company. In the case of the leases sold to Strick—the non-full payout leases—Fruehauf received no further payments (Witness Silverstein, Transcript, page 34, lines 1-4).

In 1966 Strick acknowledged Fruehauf's ownership of leased equipment under a lease to Milwaukee Motor Transportation Co., which was similar to the Seatrain lease. According to Mr. Silverstein's testimony, "it was a lease that was retained by Fruehauf, the same type of lease precisely as the Seatrain lease." (Transcript, page 47, lines 16-18). Milwaukee claimed the leased equipment was defective and complained to Strick. Strick, however, disclaimed ownership and referred Milwaukee to Fruehauf (Plaintiff's Exhibit 7, Exhibit Volume, page 344). The matter was resolved by Strick buying back the contract from Fruehauf because under the 1966 Agreement Strick was obligated to take care of any equipment produced by Strick prior to the sale (Witness Bachman, Transcript, page 205, lines 4-10).

Although admitting that the Milwaukee lease, like the Seatrain lease, was a full payout lease (Transcript, page 211), Bachman and the Court below attempted to distinguish the Milwaukee lease by the fact that it contained an option in favor of the lessee to purchase the equipment at the expiration of the lease (Transcript, page 204, lines 5-18; Decision and Opinion, Footnote 6, page 275) and upon purchase of the lease by the Finance Company, Strick Division was paid for the option. However, the option price was "a nominal sum, which was small enough

so it was certain that the lessee would exercise his option" (Transcript, page 204, lines 8 and 9). If the option price was that small, it is difficult to see why it should make any material difference with respect to who owned the equipment. Obviously, the rental payments represented substantially the entire purchase price and the option was an insignificant detail in the overall transaction.

On September 21, 1972 Fruehauf and Seatrain entered into a settlement agreement covering two wrecked trailers (Plaintiff's Exhibit 6, Exhibit Volume, page 343). Seatrain paid Fruehauf the sum of $2,952.74 and Fruehauf conveyed to Seatrain "full and perfect legal and equitable ownership." Fruehauf released and discharged Seatrain from all further obligations with respect to the damaged vehicles. The agreement was executed on behalf of Seatrain by William P. Weber. Mr. Weber's explanation of this transaction was that Seatrain had a policy of making damage payments to the party to whom it made rental payments (Transcript, page 220).

Mr. Weber stated that at the time of settlement Seatrain was aware of conflicting claims of ownership by Strick and Fruehauf. The record, however, is devoid of any claim by Strick to a share of the settlement proceeds.

The 1966 Agreement (Plaintiff's Exhibit 4, Exhibit Volume, pages 298-336) and the General Assignment and Bill of Sale thereunder (Plaintiff's Exhibit 5, Exhibit Volume, pages 337-8) both committed Fruehauf to

> "execute and deliver all such further instruments as Buyer may reasonably request to confirm Buyer's title to particular assets or properties included in the sale provided for in the agreement between the parties."

There was a further provision in paragraph 14(a) of the 1966 Agreement (Exhibit Volume, page 321) which read as follows:

> "With respect to any assets sold hereunder which

> cannot be physically delivered to Buyer because they are in the possession of third parties, or otherwise, Seller at Buyer's option shall give irrevocable instructions to the party in possession thereof, with copies to Buyer, that all right, title and interest in and to the same have been vested in Buyer and that the same are to be held for Buyer's exclusive use and benefit."

The fact is that in spite of Strick's acknowledged disagreement with Fruehauf over ownership of the Seatrain residuals, there was never any request for documentation under either of the above quoted provisions. (Witness Silverstein, Transcript, pages 39-40).

It is submitted that the above described conduct of the parties is inconsistent with the claims of Strick and confirms Fruehauf's ownership of the Seatrain residuals.

CONCLUSION

The judgment in favor of the defendants-appellees should be reversed and the cause remanded to determine the damages of plaintiff-appellant.

Respectfully submitted,

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Service of three (3) copies of
the within Brief is
hereby admitted this 24 day
of May, 1977

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